**IPMUDA BHD**

**v.**

**DATUK BUJANG BUYONG & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D4-22-1966-2000]
21 JUNE 2010

***COMPANY LAW:*** *Arrangement and reconstruction - Proposed restructuring scheme - Action by dissenting plaintiff creditor claiming for debts outstanding - Whether plaintiff entitled to enforce guarantee despite scheme of arrangement endorsed by court - Whether conditions of scheme fulfilled - Whether claims of plaintiff fully and irrevocably satisfied - Whether plaintiff entitled to maintain action against defendants*

***CONTRACT:*** *Guarantee - Enforcement of - Application for - Whether plaintiff creditor entitled to enforce guarantee despite scheme of arrangement endorsed by court - Whether conditions of scheme fulfilled - Whether claims of plaintiff fully and irrevocably satisfied - Whether plaintiff entitled to maintain action against defendants*

The first, second and third defendants agreed to be guarantors to a supply of goods contract entered into between the plaintiff and a company then known as Cygal Sdn Bhd (Cygal) in which these defendants were its directors. Cygal failed to pay various outstanding amounts under the three accounts that were set up under the contract. The plaintiff then instructed its solicitors to formally demand repayments from Cygal and the defendants, which Cygal and the defendants failed to settle. The creditors of Cygal and three of Cygal's companies deliberated a proposal containing a scheme of arrangement where Cygal proposed, *inter alia*, to repay scheme liabilities and scheme creditors, through the issuance of 'irredeemable convertible unsecured loan stocks (ICULS)' in Cygal. The plaintiff, as one of Cygal's creditors, dissented and voted against the scheme but the proposal was carried out when the majority of the creditors approved and was subsequently sanctioned by the High Court. The plaintiff filed a claim against the defendants claiming for debts outstanding under all three accounts together with interest. Years later, the scheme was carried into effect and the plaintiff was paid RM684,914 in the form of ICULS in Cygal at the issue price of RM1 each as proposed in the scheme of arrangement. Following this payment, the plaintiff claimed for the shortfall of RM1,176,621.84 (comprising the principal amount of RM13,673.92 and the balance as interest). The claim was refuted. The issue that arose was whether the plaintiff was entitled to enforce the guarantee despite the scheme of

A arrangement under s. 176 of the Companies Act 1965 endorsed by the court. The defendants argued that once the conditions of the scheme had been fulfilled, the plaintiff was estopped from reneging on the agreed terms and the defendants were released from their obligations. The plaintiff, on the other hand, submitted that the issue ought to be
B answered in the plaintiff's favour in view of cl. 7 of the guarantee itself which prevailed over the scheme of arrangement and allowed the instant action to be maintained.

**Held (dismissing the plaintiff's action):**

C **(1)** The scheme of arrangement had been sanctioned and completed. It could not be disputed that the defendants, as guarantors, were within the understanding of the term "relevant parties" mentioned in para. 2(c) of the proposed scheme as that paragraph further described the type of matters such as "relevant parties" may be
D discharged from, and these matters included "guarantees." (para 15)

**(2)** The two pre-conditions in para. 2(c) of the scheme of arrangement which were (i) all claims by the scheme creditors shall be deemed to have been fully and irrevocably satisfied and discharged and (ii) the scheme creditors would fully discharge and free Cygal and all
E relevant parties from all actions, proceedings, claims, demands or guarantees whatsoever which the scheme creditors have or may have for or in respect of the scheme liabilities, had been fulfilled. The language in para. 2(c) was clear in its intention that the guarantors such as the defendants would be discharged since the
F claims of the plaintiff as one of the scheme creditors had been fully and irrevocably satisfied. (para 15)

**(3)** The language in para. 2(c) was clear and unambiguous. Effect must therefore be given to that clear intention of the parties to, in this case, override cl. 7 of the guarantee. It was the parties themselves
G who exercised commercial judgment when deciding and voting on the scheme. This court could not substitute its judgment on that. The reading, interpretation and application of the guarantee and the scheme must be appreciated in its right chronological evolution. (para 15)

H

**(4)** The plaintiff, as secured creditor, had agreed that once the two material conditions under the scheme had been met, then any action commenced, though properly commenced under the cover of s. 176(10F) of the Companies Act 1965, would have to be
I dismissed. This was a term agreed in the scheme approved by the majority of the scheme creditors which with the sanction of the

court now statutorily binds the plaintiff. It would be contrary to the intention of the scheme if this action was allowed to be maintained. Thus, this action must be dismissed. The plaintiff was not entitled to maintain this action against the defendants. (paras 20 & 21)

**Case(s) referred to:**
*Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd [2001] 4 SLR 35* ***(refd)***
*Hill v. Anderson Meat Industries Ltd [1971] 1 NSWLR 868* ***(refd)***
*Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276 HC* ***(refd)***
*Kerpa Singh v. Bariam Singh [1965] 1 LNS 66 FC* ***(refd)***
*Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd [1998] 3 CLJ Supp 450 HC* ***(refd)***
*Pan Ah Ba & Anor v. Nanyang Construction Sdn Bhd [1969] 1 LNS 123 FC* ***(refd)***
*Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA* ***(refd)***
*Texfibre (Selangor) Sdn Bhd & Ors v. Permata Merchant Bank Bhd [1996] 1 LNS 366 HC* ***(refd)***
*Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 HC* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 176(10F), 176(10G)
Contracts Act 1950, s. 64

*For the plaintiff - EK Sng; M/s Kumar & Assocs*
*For the 1st & 2nd defendants - M Rajenthira Kumar; M/s Sng & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Mary Lim JC:**

### Undisputed Facts

**[1]** By a guarantee dated 7 February 1994, the 1st, 2nd and 3rd defendants agreed to be guarantors to a supply of goods contract entered into between the plaintiff and a company then known as Cygal Sdn Bhd (Cygal) in which these defendants were its directors. Three accounts were set up under this contract. Cygal failed to pay various outstanding amounts under the three accounts and the plaintiff then instructed its solicitors to formally demand repayments from Cygal and the defendants. Despite such demands, Cygal and the defendants failed to settle.

**[2]** Meanwhile, on 4 August 1998, Cygal and its group of subsidiary and associate companies sought and obtained orders pursuant to s. 176 of the Companies Act 1965 from the High Court in Kuala Lumpur *vide* Originating Summons No: D4-24-330-1998. One of the orders obtained under s. 176(10) of the Companies Act restrained further proceedings from being taken against Cygal. This order was extended several times until 6 December 1996 during which period the creditors of Cygal and three of Cygal's companies deliberated a proposal containing a scheme of arrangement. In the proposal, Cygal proposed *inter alia* to repay scheme liabilities and scheme creditors, through the issuance of "irredeemable convertible unsecured loan stocks (ICULS) in Cygal at an issue price of RM1 each and on the basis of one ICULS for every RM100 of debts recognized and accepted from the claims of the scheme creditors as at 31 October 1998.

**[3]** The plaintiff, as one of Cygal's creditors dissented and voted against the scheme but the proposal was carried when the majority of the creditors approved it. Following the majority vote and being bound to such majority vote, the plaintiff filed its proof of debt for the sum of RM777,702.16 on 30 November 1998. The proposal, including the proposal to repay the creditors in the form of ICULS was subsequently approved and sanctioned by the High Court in Kuala Lumpur on 23 December 1999. The order of court was later registered with the Registrar of Companies on 5 January 2000. (The order of court can be seen at p. 30 of bundle A which is actually two volumes of documents where their contents have been admitted by both parties.) On 18 October 2000, the plaintiff filed a claim against the defendants claiming for debts outstanding under all three accounts together with interest at the rate of 1.5% from 1 September 1999 until full settlement.

**[4]** About seven years later, on 26 June 2007, the scheme was carried into effect and the plaintiff was paid RM684,914 in the form of ICULS in Cygal at the issue price of RM1 each as proposed in the scheme of arrangement. All of Cygal's scheme creditors have since been similarly paid. Following this payment, the plaintiff amended its statement of claim to accommodate this payment. The present claim is for the shortfall of RM1,176,621.84 (comprising the principal amount of RM13,673.92 and the balance as interest as at 26 June 2007) together with interest at the rate of 1.5% per month on the principal sum with effect from 27 June 2007 till the date of full payment. The claim is refuted.

**Issue For Determination**

**[5]** In view of the factual matrix as set out, both parties agreed to dispense with the calling of witnesses. Their respective counsel made their submissions relying on the documents in bundle A which as

mentioned earlier are documents where their contents have been admitted. The court was invited to determine this claim by settlement of the following issue:

> Whether the plaintiff is entitled to enforce the guarantee despite the scheme of arrangement under section 176 of the Companies Act 1965 endorsed by the court on 23 December 1999?

**Submissions**

**[6]** Mr Rajenthirakumar, learned counsel for the defendants submitted that the issue should be answered in the negative. In substance, the defendants rely on the order of court, dated 23 December 1999 and the scheme of arrangement He argued that once the conditions of the scheme had been fulfilled, the plaintiff was estopped from reneging on the agreed terms and defendants were released from their obligations. He further submitted that having accepted and received payment according to the scheme of arrangement, it would be unconscionable to allow the plaintiff to pursue the current claim for the shortfall that resulted from the payment by way of ICULS which in any event fully settled the debt. Mr Rajenthirakumar also argued that the plaintiff was approbating and reprobating when it maintained this action, which course of conduct was prohibited - see *Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd* [1998] 3 CLJ Supp 450. He further submitted that the defendants had also been discharged by virtue of the payment which rendered the debt accorded and satisfied under s. 64 of the Contracts Act 1950 - *Kerpa Singh v. Bariam Singh* [1965] 1 LNS 66*; Pan Ah Ba & Anor v. Nanyang Construction Sdn Bhd* [1969] 1 LNS 123. The defendants drew support for this interpretation from the details as set out in the "Explanatory Statement to the Scheme Creditors of Cygal" which was filed together with the petition for the sanction of the scheme.

**[7]** Mr EK Sng, learned counsel for the plaintiff on the other hand submitted that the issue ought to be answered in the plaintiff's favour in view of cl. 7 of the guarantee itself read together with s. 176(10F) and (10G) of the Companies Act 1965. His argument focuses on these two provisions in the Companies Act 1965 which, in his opinion expressly preserves the right of the plaintiff to sue the defendants. It was his submission that the liability of the defendants as guarantors can only be decided by the terms of the guarantee itself. Clause 7 clearly did not allow the guarantors to be discharged even if there was an "arrangement", including one that was made under s. 176 of the Companies Act 1965. In his view, this was the correct interpretation despite how "distasteful" it may be *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786.

A **Findings Of The Court**

**[8]** I do not propose to address every argument that has been raised by the parties. Suffice to examine the issue from the perspective of s. 176(10F) and (10G) of the Companies Act 1965 and the scheme of arrangement. Learned counsel for the plaintiff's argument in short, is to say that cl. seven of the guarantee prevails over the scheme of arrangement and allows instant action to be maintained. This is what clause seven of the guarantee says:

> 7. This guarantee and your rights under it shall be in addition to and shall not be in any way affected or prejudiced by our holding or taking other or further guarantees or securities or by your varying, releasing or omitting or neglecting to enforce any such securities or by your varying and determining any credit to the customer or giving time for payment or granting any other indulgence to or making any other arrangement with or accepting any composition from the customer or any person or persons, corporation or corporations liable on any bills of exchange, promissory notes or other negotiable instruments or securities held or to be held by you.

**[9]** In my view, the plaintiff's reading of s. 176(10F) and (10G) is reasonable and correct; that plaintiff's right to sue the defendants is preserved despite the existence of the scheme. This is what s. 176(10F) and (10G) say:

> (10F) An order made by the court under sub-s. (1) shall not have the effect of restraining further proceedings in any action or proceeding against any person other than the company that had applied lot the restraining order.
>
> (10G) For the purpose of sub-s. (10F), the term "any person" includes a guarantor of the company.

**[10]** These new provisions introduced in 1998 and 2000 respectively makes it abundantly clear that actions and proceedings may still be brought against persons other than Cygal even where a scheme of arrangement has been drawn up, approved not only by the creditors and thereby binding on the minority dissenting creditors, but also where it has received the approval and sanction of the court. Read together with s. 176(10G), this would mean that actions against guarantors may still be brought. The present action is just one such instance.

**[11]** Such actions are also not prohibited by the terms of the explanatory statement itself and it would be opportune to set out paras. 2(a), (b), (c) and (d) of the explanatory statement:

2. Details of the Proposed Scheme

The Proposed Scheme seeks to repay the Scheme Liabilities through the issuance of ICULS in Cygal at an issue price of RM1 each. The Scheme Liabilities will be fully repaid under the Proposed Scheme as compared to the recovery value of 6 sen on a break-up basis as assessed by Arthur Anderson Corporate Advisory Sdn Bhd in its report dated July 1998 ("report"). The report is available for inspection at the registered office of the company during normal business hours from of date of this Explanatory Statement up to and including the date of the creditors meeting.

The principal terms of the Proposed Scheme are as follows:

(a) All interest and penalties accruing after 31 October 1999 until the date the Proposal Scheme becomes effective shall be completely waived by the Scheme Creditors.

(b) Amount due to the Scheme Creditors shall be settled by the issuance of ICULS at the issue price of RM1 per ICULS and on the basis of one (1) ICULS for every RM1.00 of debts recognized and accepted from the claims of the Scheme Creditors as at 31 October 1998.

The details of the principal terms of the ICLUS are as set out in s. 3 hereunder.

(c) Upon the sanction of the proposed scheme by the court and the completion of the same, all claims by the scheme creditors shall be deemed to be have been fully and irrevocably satisfied and discharged and the scheme creditors shall fully discharge and free Cygal and all relevant parties from all actions, proceedings, claims, demands or guarantees whatsoever which the Scheme Creditors have or may have for or in respect of the Scheme Liabilities notwithstanding any deficiencies, mistake and error of whatsoever kind in the proof of debts filed by the Scheme Creditors or the failure or omission to file proof of debts and no action, suit, arbitration, proceeding and/or enforcement of security may thereafter be initiated or maintained by any Scheme Creditor in respect of all claims by the Scheme Creditors admitted for proof under the Proposed Scheme.

(d) All legal proceedings commenced and filed in any court or other tribunal or competent jurisdictions by a Scheme Creditor in respect of amount due to him shall, upon the acceptance by him of the proposed scheme and upon the said scheme becoming effective, be dismissed on the terms that each party shall bear its own costs. All orders, awards, judgment debts, interest thereon and costs relating to any of the Scheme Liabilities shall be subject to the proposed scheme and be satisfied in the manner above and the judgment creditors shall be prohibited from levying any writ of execution or other similar motions against Cygal Group.

**[12]** In my judgment, when the plaintiff filed this action against the defendants on 18 October 2000, the action was not only not prohibited by the terms of the scheme but was also proper under s. 176(10F) and (10G) of the Companies Act 1965. This is apparent from the terms of the scheme of arrangement itself. At paras. 2(a) and (b), there are provisions on the manner in which the debts due to the Scheme creditors would be settled, and, the position of interest and penalties that accrue in the interim period before the scheme becomes effective, that such interest and penalties will be completely waived by the scheme creditors.

It is apparent from para. (c) that the scheme would only become effective upon fulfillment of two conditions, that is when the scheme is sanctioned by the court and when the scheme is completed. In other words, the scheme is conditional. That being so and in relation to s. 176(10F) and (10G), the point is therefore correctly taken by learned counsel for the plaintiff.

**[13]** However, in no way does this mean that any action or proceeding that has been brought cannot be disputed or challenged. In my view, cl. 7 of the guarantee does not imply that there can never be discharge of the guarantors from liability. Neither does s. 176(10F) mean that the parties cannot agree to discharge the guarantors with the drawing up of a scheme management, particularly one which is endorsed by the court. There is nothing in law which prohibits a creditor from agreeing with the principal debtor to discharge a guarantee provided such an agreement to discharge is expressed with some measure of certainty - *Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd* [2001] 4 SLR 35 In my judgment, the operation of clause seven can be displaced with words which clearly express the intention of the parties to over-ride this operation.

**[14]** Having examined these relevant provisions and having regard to the circumstances, once the two conditions in para. (c) are fulfilled, "all claims by the scheme creditors shall be deemed to be have been fully and irrevocably satisfied and discharged" and the scheme creditors will fully discharge and free Cygal and all relevant parties from all actions, proceedings, claims, demands guarantees whatsoever which the scheme creditors have or may have for or in respect of the scheme liabilities.

**[15]** It is not in dispute that the scheme of arrangement has been sanctioned and completed. To my mind, it cannot be disputed that the defendants who are guarantors are within the understanding of the term "relevant parties" mentioned para. 2(c) as that paragraph further

describes the type of matters such "relevant parties" may be discharged from, and these matter include "guarantees". With the fulfillment of the two pre-conditions, the language in para. 2(c) is clear in its intention that the guarantors such as the defendants will be discharged since the claims of the plaintiff as one of the scheme creditors "shall be deemed to have been fully and irrevocably satisfied". In my view, the language in para. (c) is clear and unambiguous in this. Effect must therefore be given to that clear intention of the parties to, in this case, over-ride clause seven of the guarantee. After all, it is the parties themselves who exercised commercial judgment when deciding and voting on the scheme. This court cannot substitute its judgment on that. The reading, interpretation and application of the guarantee and the scheme must be appreciated in its right chronological evolution as has been done here.

**[16]** A further fact that weighs in my mind is the presence of the merchant bankers and lawyers who provided the necessary advice all the way through on the operation and impact of the scheme of arrangement. Further, the directors who were the guarantors and the plaintiff were also present at the material time of the proposal and the creditors' meeting. This indicates the awareness of the parties as to status of persons other than Cygal, and their respective peculiar rights and obligations, whether under the principal contracts or the guarantee. It would have been quite reasonable to expressly reserve the right to sue upon the guarantee even with sanction and completion of the scheme, if that contrary was the intended position. Instead, the use of the term "guarantee" was expressly incorporated in para. (c). This clearly indicates the intention of the parties to include the discharge of the guarantors from any guarantee.

**[17]** The several decisions cited by both parties, namely *Wangsini Sdn Bhd v. Grand United Holdings Bhd* [1997] 5 CLJ 664*; Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276; *Texfibre (Selangor) Sdn Bhd & Ors v. Permata Merchant Bank Bhd* [1996] 1 LNS 366; *Hill v. Anderson Meat Industries Ltd* [1971] 1 NSWLR 868 must be examined and appreciated on the facts. Once done, it will be seen that the pertinent clauses in the respective cases were quite different from the language used in paras. 2(c) and (d).

**[18]** For instance in *Hill v. Anderson Meat Industries Ltd* the issue was whether a discharge of the principal obligation in the bankruptcy on an individual or in the winding-up of a company of an insolvent company releases a guarantor from liability. And the answer was, no. The court recognized that the guarantor's obligation "continues as a source of a right to obtain payment out of his assets". At p. 875, the court said "... in the absence of any special provision in the guarantee agreement, the guarantor's liability subsists in exactly the same manner as if the

scheme had been formally approved within a current winding up" At p. 877, the court went further to add "In the absence of some special stipulation in the contract of guarantee a creditor is not obliged to oppose a scheme or to insist upon the insertion of a reservation of rights in order to preserve the enforceability of his claim against the guarantor. The approval by the court of the scheme amounts to a discharge of the debtor company's liability by operation of law discharge is effected by the court order and not by events antecedent thereto, *albeit* that these antecedent events are indispensable statutory prerequisites of the court's jurisdiction to make an order approving a scheme and this rendering it binding on the company and its creditors." In *Texfibre (Selangor) Sdn Bhd* the court examined cl. 23 of the scheme and pronounced that the clause and thereby the scheme though sanctioned by the court, did not release the guarantor unless the terms of the guarantee expressly state otherwise. The court, amongst others, found that cl. 23 did not purport to bind the guarantors but merely spelt out the rights and obligations of the petitioners and creditors. In neither of these cases were there express terms concerning the position of other parties and guarantees such as are available in the facts of this case. These cases are therefore good as to offer general proposition but not where the conditions can be shown to be specific or distinct.

**[19]** The object of s. 176 is to float a flagging company. In para. 2(f) of the Explanatory Statement, it is clearly stated that "The proposed scheme is part of an integral turnaround scheme with the primary objective of putting the group back on stronger financial footing". In implementing the said turnaround scheme, the settlement of debts is addressed and as seen from the facts, was honoured. It would be wrong for any of the parties to go back on what was agreed.

**[20]** The filing of this action may be said to have been pre-emptive on the part of the plaintiff in the event the two pre-conditions in para. (c) are not satisfied. In which case, it would be open to the plaintiff to continue with the action already filed. The situation may well have been different if this action had come up for disposal earlier, before the two pre-conditions had been fulfilled. But, that was not to be the case when the matter finally came up for trial. At the time of filing, the plaintiff quite rightly, was suing for the full sum as it was uncertain if the proposal will crystalise. However, this court will have examined the claim as the conditions stand today. The plaintiff has been paid but not to the full extent as claimed. That may be so, but the plaintiff as secured creditor has agreed that once the two material conditions under the scheme have been met, then any action commenced, though properly

commenced under the cover of s. 176(10F) will have to be dismissed. This is a term agreed in the scheme approved by the majority of the scheme creditors which, with the sanction of the court now statutorily binds the plaintiff. That being the case, it would be contrary to the intention of the scheme if this action is allowed to maintain. With the application of para. (c) read together with para. (d), this action must be dismissed.

**[21]** The issue posed is therefore answered in the defendants' favour. The plaintiff is not entitled to maintain this action against the defendants. However, consistent with the same terms in the scheme of arrangement, each party is to bear its own costs with the dismissal of this action.